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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 681

H. FRANKLIN HAMILTON,
Petitioner,

v.

THE STATE OF OHIO
and
THE CLEVELAND BAR ASSOCIATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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INDEX.

Petition for a Writ of Certiorari 1

Citation to Opinions Below 1

Jurisdiction 2

Constitutional Provision Involved 2

Statement of the Case 3

Excerpts From Record 3

Argument 13

Excerpts From Record 13

Ohio Law 15

APPENDICES:

A. Rule XXVII of The Ohio Supreme Court Disciplinary Procedure 18

B. Complaint Before The Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio 20

C. Findings of Fact and Recommendations of The Board of Commissioners 24

D. Opinion of The Supreme Court of Ohio 30

E. Section 2907.34, Ohio Revised Code 33

TABLE OF AUTHORITIES.

Cases.

Prudential Insurance Co. v. Broemer, 19 N. P. (NS) 510 16

Shelley v. State, 19 C. C. (NS) 164 15

Constitution.

United States Constitution, Amendment XIV, § 1 2

Statutes.

2907.34, Ohio Revised Code ---------- 33

28 U. S. C. 1257 (3) ---------- 2

Rules.

Rules of Practice of The Supreme Court of Ohio

Rule XXVII (1), (5), (6) ---------- 18

(21), (24) ---------- 19

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THE STATE OF OHIO,

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THE CLEVELAND BAR ASSOCIATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

Petitioner prays that a writ of certiorari be issued to review the judgment of the Supreme Court of Ohio, entered in the above entitled case on June 15, 1966, and as to which rehearing was denied on July 20, 1966, in the matter of The Cleveland Bar Association vs. H. Franklin Hamilton, being cause number DD #73 of the records of the Supreme Court of Ohio and reported in 6 Ohio State 2d, page 264, Bar Association Report.

CITATION TO OPINIONS BELOW.

RULE XXVII of the Rules of The Ohio Supreme Court pertaining to "Disciplinary Procedure" is printed in Appendix A, pp. 18-19 below.

COMPLAINT before the Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio is printed in Appendix B, pp. 20-23 below.

The Findings of Fact and Recommendations of the Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio are printed in Appendix C, pp. 24-29 below.

The Opinion of The Supreme Court of Ohio is printed in Appendix D, pp. 30-32 below.

Section 2907.34 of the Ohio Revised Code is printed in Appendix E, p. 33 below.

JURISDICTION.

The judgment of the Supreme Court of Ohio was entered on June 15, 1966. A timely Petition for Rehearing was filed on June 27, 1966 and was denied on July 20, 1966. The judgment is final, and is from the highest court of the State of Ohio. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3), since petitioner claims rights, privileges, and immunities under the Constitution and statutes of the United States.

CONSTITUTIONAL PROVISION INVOLVED.

UNITED STATES CONSTITUTION, AMENDMENT XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE.

Respondent herein, The Cleveland Bar Association, did bring charges against the petitioner herein, as more fully set forth in verbatim form in Appendix C. Excerpts from the testimony introduced before the panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio are herein set forth as follows:

EXCERPTS FROM RECORD.

In the testimony offered by Relator, we find the following as testified to by ALEXANDER NAGY, the original complainant, commencing with page 27 of the Record:

R. p. 31:

"Q. Mr. Hamilton took you out on Wooster Road and showed you two buildings, is that right?

A. Right.

Q. Did he talk to you when he was showing you the buildings?

A. The only thing that he said was that he could buy those buildings.

Q. Did you have any other talk with Mr. Hamilton after he showed you the buildings?

A. Yes, he did.

Q. What was the talk? What did he tell you and what did you say to him?

A. He said that in the event that they couldn't buy this building that there was another building that he had in mind that could be bought."

R. p. 34:

"Q. After you gave Mr. Hamilton the $4000.00, what happened?

A. He said that he was going to invest that into the building and he was waiting for the results."

R. p. 35:

"Q. Did he tell you how much you were going to make?

A. I was to receive 20% of the stock.

Q. Now when was this conversation with reference to the time that you had given him the money? Was it after you gave him the money?

A. I am sorry. I can't say the time, but was after—two or three months. Interpreter: "He said it was approximately two or three or four months after he turned the money over to him."

R. p. 36:

"Q. Did Mr. Hamilton ever come to your place and tell you that he was going to form a new corporation?

A. He was—was he over there? Yes."

CROSS EXAMINATION.

R. p. 38:

"Q. Mr. Nagy, the first conversation that you had with Mr. Hamilton was to the effect that Hamilton said to you that he had an opportunity of purchasing one or two buildings and selling them suite by suite for a greater price than the purchase price, didn't he?

A. Yes. Interpreter: His answer is yes.

Q. And in that way, a nice profit could be made?

A. This is right. That is right. That is true."

R. p. 42:

"Q. Mr. Hamilton told you at first that he was experienced in buying and developing real estate and that he would handle this entire transaction his own way, and you said 'that's all right' isn't that true?

A. That is right. He did say it was his right."

R. p. 43:

"Q. Now, when was the first time that you learned that Mr. Hamilton couldn't buy these buildings?

A. He said it was about five, six months afterwards that he found out that the deal couldn't go through."

TESTIMONY GIVEN ON BEHALF OF RESPONDENT BY RESPONDENT.

R. p. 48:

"Q. Let's try and get down to the matter involved in this cause. I want to ask you whether you have had any experience in the past in promoting real estate purchases and sales?

A. Yes, I have.

Q. And approximately how many large propositions have you handled successfully?

A. 12 or 14. I have purchased, for my clients and ourselves, terraces that we would split. We split the terraces and give separate deeds to each unit. We did this quite successfully prior to 1960, at which time—

Q. About this Wooster Road, what was your intention there?

A. There was a number of 6-suite units in one parcel belonging to Mr. and Mrs. Skala, I believe, if I recall correctly, they had 24 suites—maybe 32. Then another group had another group of buildings, six units in each, and I think we had a total in these two units, these two parcels of land, approximately 36 units altogether—maybe 40. I intended to take an option on the property. I had a group of investors that had been going along with me. They are a group from the Northeast Food Terminal here in Ohio. They are composed of people who buy and sell.

Q. Suppose we try to cut this down a little bit.

You did intend to acquire these premises and sell it suite by suite, is that true?

A. What we had done in the past was to take an option and then procure a buyer and then use the title company in town—several of them that went along with us—and we would have the title split along with the property being re-surveyed for title, for a legal title. We would give a new deed.

Q. The purchase price?

A. The purchase price, yes, that was determined and it is also in the option, $202,000 for one property and, I believe, it was $234,000 or something like that for the other property."

R. p. 50:

"Q. How much money would you need for an option?

A. A thousand dollars. In six months our option expired. We had to have extensions because—"

R. p. 50:

"Q. Did you pay any additional funds for extensions?

A. I paid that out of my own pocket.

Q. How much?

A. It was about $800 or a thousand dollars, something like that.

Q. For extensions?

A. For extensions, rents. We rented one apartment to show the suite. They were all alike—about alike. So we would keep one open and I kept a woman in that suite. That cost $200 a month.

Q. How many months did you have her there?

A. About 12 months. About a year. We had these properties about a year.

Q. And these funds paid to this woman for showing the suite, for instance, were out of the funds that you had set aside for the purchase, development of these properties?

A. That is right.

R. p. 51:

"Q. And was the $4,000 that you had gotten from Mr. Nagy included in these funds?

A. These were funds—it was understood that the $4,000 would cover this because, in the past, $4,000 had always covered it. $2,000—

Q. Did you use these funds, this $4,000, in an attempt to develop the business that you had represented to Mr. Nagy you would develop?

A. I did.

Q. And on top of the $4,000 did you use any other funds?

A. I used funds of my own.

Q. Approximately how much?

A. Around $800 to $1,000.

Q. Now, you discovered eventually that you couldn't purchase these properties and develop them. What was the cause and the reason?

A. In this area, this is next to Rocky River and there were a number of apartments started. There were apartments to be sold, condominiums. They were starting condominiums in that area. I couldn't even rent an apartment if I wanted to rent it. No one would take the apartment we had. We thought, if we would get rid of that apartment, it would save us the rent. We couldn't sell anything because apartments were being built all around us at this time. I told Mr. Nagy, 'I think we are going to have to take a loss.'"

R. p. 52:

"A. In the beginning I told him that we might be faced with a loss. I said, 'This amount that you will be putting up will be risk. It is a small amount for what he can make in the end. I allowed 20 per cent for Mr. Nagy, 20 per cent to myself and the lawyers that I would bring in with me to write the various deeds, because it is a big job in a case like this, and I

allowed 60 per cent to the investors who would come along.

At last I saw, with the competition in the area with other suites, that we would be in very great difficulty if we would take these because I knew and I could see—I talked with various real estate men in the area—there were going to be a lot of vacancies there, which did develop. I decided it would be better to take a small loss of $4,000 than a large loss that would confront us in the future."

R. p. 53:

"I went to him and I talked with Mrs. Nagy, and Mrs. Nagy cried because she said they couldn't afford to lose. I had never lost in any kind of transaction before. This was my first loss.

I told Mr. and Mrs. Nagy that I was very, very sorry, and I am to this day. I like Mr. Nagy.

At that time I gave a coghovit note. My law partner, Frank Wagner, called me into his office and he said, 'I have known the Nagys for years and you have got to do something about this.'

So I made a cognovit note, showed it to Frank, and took it to Mr. and Mrs. Nagys', their tavern, and I gave it to them. Mr. and Mrs. Nagy. Mrs. Nagy took the note, and then she said, 'You go in and talk with Mr. Nagy.' "

R. p. 55:

"Q. As a matter of fact the, Nagys invested this $4,000 with you?

A. Yes.

Q. They invested this money for the purpose of trying to develop what you had explained to them, the purchase of this $400,000 worth of real estate?

A. That is correct. I told them in the beginning—

Q. But when you gave him the promissory note, you determined that you wanted to make them whole

* * * You decided that you were going to try to pay this money out of your own pocket?

A. That is the purpose."

R. p. 56:

"Q. Now, were you able to raise the $4,000 with which to meet the note at any time before today?

A. No.

Q. Have you been able to borrow the $4,000 to meet your promissory note?

A. Yes, I have.

Q. Do you have that $4,000 here in open court with you?

A. I have it here.

Q. And that money was borrowed from a personal friend of yours, is that correct?

A. That is right.

Q. And you are willing, ready and able to pay the $4,000 to Mr. Nagy and to cancel your promissory note?

A. I am.

Mr. Kearns: And we now, if the Panel please, make a tender to do so."

R. p. 57:

"The Witness: (Hamilton) I have been thinking about this many, many times, because I went to Mr. Kormendy's office and he told me he had the note. I went there and he told me one time—he said he wants a note in place of this note, and I couldn't figure that out."

R. p. 58:

"Q. You did testify that you paid $1,000 of options to purchase each one of these properties that you had in mind at the time?

A. That is right.

Q. And that you also paid approximately 800 to 1,000 dollars to renew them after their expiration?

A. I paid for extensions of the time; I paid for rent; I paid for advertising; I paid for a woman to be in the suite so that it would be open.

Q. Did you at any time use any of this $4,000 for your personal affairs?

A. No."

R. p. 59:

"Q. Did you at any time intend to do other than what you represented to Mr. Nagy you would do with this $4,000 pertaining to the development of this real estate property?

A. That money was all used in the development. I have used my own money, plus all of my hours. I must have had several hundred hours in this thing of my own time.

Q. Why did you start this partnership account with you and Frank Wagner at the bank?

A. We went into the bank and we wanted to deposit this under the corporations, and he said, 'Are these corporations formed?' And we have just talked about it at Mr. Nagy's restaurant or tavern, and the banker told us that we could not put it under—in the name of the corporation. He was right. We hadn't thought about it.

He said, 'I will put it under your names,' and without thinking he put it under our names and put 'partners.'

Q. But truthfully and rightfully speaking, you and Mr. Wagner were not partners in this transaction?

A. No. He was going to act as a lawyer when we had the legal work developed."

"Cross Examination (By Mr. Rose).

R. p. 63:

"Q. Where is the original option if this is the extension? Will you look at that, please? What names are on there?

A. The names appear—'In consideration of $1,000 received in—' That is right there. It is taken out, the option is taken out in the name of Nagy Eleven-Six."

R. p. 67:

"Mr. Kearns: May I at this time make a statement for the record: During the noon hour, we paid Mr. Nagy $4,000 and received a complete release from him for any obligation due him in the matter, basic principle of which is being tried here."

RE-DIRECT EXAMINATION (By Mr. Kearns).

R. p. 68:

"Q. Now, there were questions raised during cross-examination with reference to these corporations, and the fact is that the evidence does show that you did incorporate a company known as Wooster—

A. Wooster House.

Q. And you did not incorporate the Nagy Number Three and Nagy Number Six?

A. That is right.

Q. Will you explain why you did that?

A. When I saw that it would be impossible to sell these buildings by suites, I went to the Zoning Board of Rocky River and I asked them if I could have permission to turn this, the group of buildings, into a large motel and use it, the center building, for an office. One of the zoning people that worked on the Zoning Board, and he told me that it could be done. So I came back and I incorporated the Wooster House because I saw I couldn't sell by units, and I thought this was the way out. Then I went back to the Zoning Board and presented the whole thing before the Zoning Board and they turned it down. I had the corporation formed, the Wooster House formed, but again I was stymied and I couldn't do anything at that time. I had to give up."

R. p. 69:

"Q. The Wooster House, that was to take the place of the two corporations that you agreed to form with Mr. Nagy?

A. That is right.

Q. And Mr. Nagy, if you had been able to promote that, would have partaken in the Wooster House in the same manner as he would have in the other two corporations?

A. That is right. And I told Mr. and Mrs. Nagy I was doing this. I went to their house. We had telephone conversations.

Q. You told them that you were changing the name of the corporation?

A. That is right.

Q. You felt you had a right to do it because of your original agreement with the Nagys as he testified and as you testified, that you could do this in your own manner and own way?

A. That is right."

ARGUMENT.

The questions which we ask this Honorable Court to decide in this Petition for a Writ of Certiorari are simply this:

The petitioner herein throughout this entire cause and the evidence adduced was not proven to be the attorney for the investor, Mr. Nagy, but merely an investment agent promoting a real estate transaction in which the investor did invest the sum of $4,000 with the expectancy of making a profit thereon but he did not deliver said funds to the petitioner herein *as a client* of the petitioner, since the investor (Mr. Nagy) testified in the Record as follows:

Page 38:

"Q. Mr. Nagy, the first conversation that you had with Mr. Hamilton was to the effect that Hamilton said to you that he had an opportunity of purchasing one or two buildings and selling them suite by suite for a greater price than the purchase price, didn't he?

A. Yes. Interpreter: His answer is yes.

Q. And in that way, a nice profit could be made?

A. That is right. That is right. That is true."

Page 42:

"Q. Mr. Hamilton told you at first that he was experienced in buying and developing real estate and that he would handle this entire transaction his own way, and you said 'that's all right,' isn't that true?

A. That is right. He did say it was his right."

Page 43:

"Q. Now, when was the first time that you learned that Mr. Hamilton couldn't buy those buildings?

A. He said it was above five, six months afterwards that he found that the deal couldn't go through."

Testimony on Behalf of Petitioner Herein.

Page 48:

"Q. About this Wooster Road property, what was your intention there?

A. I intended to take an option on the property. I had a group of investors that had been going along with me. They are a group from the Northeast Food Terminal here in Ohio. They are composed of people who buy and sell.

Q. You did intend to acquire these premises and sell it suite by suite, is that true?

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"Q. Did you use these funds, this $4,000, in an attempt to develop the business that you had represented to Mr. Nagy you would develop?

A. I did.

Q. And on top of the $4,000 did you use any other funds? A. I used funds of my own."

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"Q. As a matter of fact then, the Nagys invested this $4,000 with you?

A. Yes.

Q. They invested this money for the purpose of trying to develop what you had explained to them, the purchase of this $400,000 worth of real estate?

A. That is correct. I told them in the beginning—"

This Honorable Court will note that our statute, Section 2907.34 of the Ohio Revised Code, which is the statute referred to by our Supreme Court in the disbarment proceedings, indicates specifically "an attorney at law of a person." Again we reiterate that there is no evidence in this cause proving that petitioner herein was the attorney for the investor, Mr. Nagy.

Ohio Law.

"One is not guilty of embezzlement who has not concealed the receipt of money alleged to have been embezzled, but, on the contrary, has claimed in good faith to keep it under some right as against the owner." *Shelley v. State,* 19 C. C. (NS) 164.

> "If an agent has not paid over to his employer all the money which he has collected, through an honest mistake, or through an error in keeping books or through a misunderstanding of instructions, he is not guilty of embezzlement since there is no criminal intent." *Prudential Insurance Co. v. Broemer,* 19 N. P. (NS) 510.

We contend and urge upon this Honorable Court that the petitioner herein (respondent in the disbarment proceedings) could not be held guilty of embezzlement under Ohio law. Since petitioner herein, the respondent in the disbarment proceedings, did not handle this transaction as an *attorney* for the investor, he cannot be held guilty of violating the Canons of Legal Ethics pertaining to the investment made by Mr. Nagy in this purely business transaction. There was no *intent* by petitioner to convert any of these funds to his own use since the evidence clearly discloses that he had not converted said sums to his own use to deprive Mr. Nagy of said funds except as an investment in the transaction as originally agreed upon.

> QUERY: Is petitioner herein and respondent in the disbarment proceedings below to be deprived of his very honor, his reputation for being a man of good character, his very livelihood, because of a purely business transaction which failed, there being no attorney-client relationship in this purely business transaction? Isn't such deprivation contrary to the Fourteenth Amendment of the United States Constitution, and isn't the petitioner being deprived of his constitutional rights without due process of law?

The following is the statement of the petitioner and respondent below, taken from page 52 of the Record:

> "In the beginning I told him that we might be faced with a loss. I said, 'This amount that you will be putting up will be risk.' It is a small amount for what he can make in the end. I allowed 20 per cent for Mr.

> Nagy, 20 per cent to myself and the lawyers that I would bring in with me to write the various deeds, because it is a big job in a case like this, and I allowed 60 per cent to the investors who would come along."

The very basis of the Supreme Court's finding and judgment against the petitioner herein was drawn (as this Honorable Court will note in the Judgment of the Supreme Court of Ohio) that the petitioner herein allowed himself 20 per cent but *not as attorney for Mr. Nagy* but "to myself and the lawyers that I would bring in with me to write the various deeds." In other words, his explanation (and this is the only evidence in the record on this score which was also never denied by the Relators below) is that he would use part of his 20 per cent to pay lawyers for drawing deeds to the individual and various suites as they were sold and the transfer of title would become necessary. We sincerely feel that we need not belabor this Honorable Court further with argumentation, since the entire factual situation has heretofore been fully and completely set forth for the information of this Honorable Court, and we again very sincerely say that to punish the petitioner herein (the respondent below) merely because of the fact that he was a member of the legal profession, is depriving him as a citizen of this great United States of America of equal rights, and becomes *class discrimination.*

We therefore very respectfully say to this Honorable Court that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

A. L. KEARNS,
1320 Williamson Building,
Cleveland, Ohio 44114,
Attorney for Petitioner.

August 27, 1966.

APPENDIX A.

Rule XXVII of The Ohio Supreme Court.

Disciplinary Procedure.

Pursuant to the powers of this Court over the Bar of this State and the members thereof, Rule XXVII is hereby amended, as follows, effective on January 1, 1957, and to remain in force until altered or abrogated.

(1) CREATION OF BOARD OF COMMISSIONERS, ON GRIEVANCES AND DISCIPLINE. There is hereby created as Commissioners of this Court a Board of Commissioners on Grievances and Discipline. Said Board of Commissioners is empowered and charged to receive, entertain, inquire into, take proofs, make findings and submit recommendations to this Court, as hereinafter provided,

(a) concerning complaints of misconduct as hereinafter defined which are alleged to have been committed by an attorney or counselor at law or judge, or

(b) concerning practices of any attorney and counselor at law or judge, which tend to defeat the administration of justice or to bring the courts or the legal profession into disrepute.

(5) DEFINITION OF MISCONDUCT. Misconduct, as the term is used herein, shall mean any violation of any provision of the oath of office taken upon admission to practice of law in this State, or any violation of the Canons of Professional Ethics or the Canons of Judicial Ethics as adopted by the Court from time to time, or the commission or conviction of a crime involving moral turpitude.

(6) MANNER OF DISCIPLINE. Each attorney and counselor at law or judge found guilty of misconduct shall be disciplined. The discipline of such persons shall be

(a) a permanent disbarment from the practice of law, or

(b) suspension for an indefinite period from the practice of law subject only to reinstatement as hereinafter provided.

(21) PETITION FOR REINSTATEMENT, WHEN IT MAY BE FILED. No petition for reinstatement to the practice of law shall be entertained by this Court, and the same may not be filed within this Court, within a period of two years after the entry of an order indefinitely suspending the Petitioner from the practice of law in this State, or within a period of two years after the denial of a petition for reinstatement to the practice of law filed by such Petitioner.

(24) REQUISITES FOR REINSTATEMENT: PASSAGE AT REGULAR BAR EXAMINATION. No person shall be reinstated unless he has established by clear and convincing evidence that

(a) he has rehabilitated himself, and

(b) possesses all the qualifications, mental, education and moral, which would have been a requirement of an applicant for admission to the Bar of Ohio at the time of his original admission. In such case the order of reinstatement shall

(i) permit the applicant to take one of the regular bar examinations of the Supreme Court of Ohio, and

(ii) be conditioned upon the applicant's subsequently taking and passing such examination and thereafter taking the prescribed oath of office.

(We are citing the above Rules as published in RULES OF PRACTICE in The Supreme Court of Ohio, January Term, A. D. 1959 (issued as of May 15, 1961).

APPENDIX B.

Complaint Before the Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio.

COMPLAINT

"BEFORE THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

In re:

Complaint against
H. FRANKLIN HAMILTON
1836 Knowles Avenue
East Cleveland, Ohio
Respondent

THE CLEVELAND BAR ASSOCIATION
Mezzanine—Manger Hotel
Cleveland, Ohio
Relator

No. 101

COMPLAINT AND CERTIFICATE

(Rule XXVII of Supreme Court of Ohio)

"Now comes the Relator and alleges that H. FRANKLIN HAMILTON, an Attorney at Law, duly admitted to the practice of law in this State of Ohio is guilty of the following misconduct:

That on or about October 25, 1961, respondent together with another Attorney at Law came to Alex Nagy at his place of business located at 4382 West 130th Street, Cleveland, Ohio. The latter introduced him to respondent and explained to him in Hungarian that respondent had made money for investors and would be able to make money for Mr. Nagy by puchasing real estate in the name of a syndicate.

The next day respondent took Mr. Nagy to Rocky River, Ohio, on Wooster Road south of Hilliard Road and showed him two apartment buildings and told him that he was in a position to buy these properties very cheap in the name of a corporation which he would organize and make his investment in the stock of the corporation.

On November 6, 1961, respondent came to Mr. Nagy's place of business and obtained two checks of $2000.00 each, which was in payment for twenty percent (20%) of the stock of Nagy Eleven-Three, Inc., and Nagy Eleven Six, Inc., to be incorporated and organized by respondent. A receipt for $4,000.00 was given.

Respondent, H. Franklin Hamilton, and his associates, was to receive twenty percent (20%) of the stock issued by each corporation for their legal services therein.

After a long period of time Mr. Nagy inquired of respondent when the corporations would be organized, stock issued, and the real estate purchased, and each time he received evasive answers from respondent, or that he was negotiating for the property. Respondent at a later date came to Mr. Nagy's place of business and informed him that the new corporation was about to purchase a piece of property in which a profit of approximately $40,000.00 was going to be made for the benefit of the stockholders. Mr. Nagy never received any stock from respondent.

Mr. Nagy then consulted other counsel who informed him that no Ohio corporations had been organized under the names of "Nagy Eleven Three, Inc." or "Nagy Eleven Six, Inc." During all the time prior to consulting other counsel respondent had advised Mr. Nagy not to discuss the matter with anybody and to keep the matter a secret.

The two checks received by respondent from Mr. Nagy were cashed by respondent at The National City

Bank of Cleveland, Main Office; the sum of $1000.00 was deposited in account No. 2059700 for Nagy Eleven Six Co., a partnership; and the sum of $1,000.00 was deposited in account No. 2059698 for Nagy Eleven Three Co., a partnership. The Partnership Authorizations and Signature Cards for each of the above named companies, and authority to withdraw funds, were as follows:

"Partner—/s/ Frank J. Wagner

"Partner—/s/ H. Franklin Hamilton" Two (2) signatures required.

The above checks were Official Checks of The Cleveland Trust Company, each in the sum of $2000.00 and bear the following endorsements:

"Alexander Nagy
Alex Nagy
Payment for twenty percent of stock in
Nagy Eleven Six, Inc.
/s/ H. Franklin Hamilton"

and

"Alexander Nagy
Payment for twenty percent of stock in
Nagy Eleven Three, Inc.
/s/ H. Franklin Hamilton"

Articles of Incorporation of Wooster House, Inc. were filed with the Secretary of State on August 6, 1962, but no further corporate proceedings were had.

A Land Option was granted to The Nagy Eleven Three, Inc. on January 10, 1962, for a period of six months by Morton H. Frank and Wilbur J. Bailis and their wives for the consideration of $1000.00 for property located at 2626 to 2702 Wooster Road, Rocky River, Ohio.

A Real Estate Option for six months was entered into on December 14, 1961, for the consideration of $1000.00 between The Hilliard-Rocky River, Inc. and The Nagy Eleven Six, Inc., H. Franklin Hamilton signing his name as President and Frank J. Wagner signing as Secretary of the latter.

H. Franklin Hamilton gave Mr. Nagy a note for $4000.00 which is past due and unpaid, and has recognized that he owes $4000.00 to Mr. Nagy.

WHEREFORE, relator requests that a copy of this Complaint be sent to the respondent; that upon notice a formal hearing be held before a panel of three commissioners, all pursuant to and in accordance with the applicable provisions of Rule 27 of the Supreme Court of Ohio; that the respondent be found guilty of misconduct as defined in paragraph 5 of said Rule 27 and that the panel of commissioners take such action as they shall deem appropriate.

S/ E. M. ROSE
Counsel for Relator
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S/ ROBERT N. GUDBRANSON
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FILED
Apr 23 1965
Board of Commissioners
on Grievances and Discipline
William D. Radcliff, Sec'y."

APPENDIX C.

Findings of Fact and Recommendations of Board of Commissioners.

Case No. 101.

BEFORE THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO.

IN RE: COMPLAINT AGAINST
H. FRANKLIN HAMILTON,
Respondent,
THE CLEVELAND BAR ASSOCIATION,
Relator.

FINDINGS OF FACT AND RECOMMENDATION OF BOARD OF COMMISSIONERS.

This matter came on for the consideration of the Board of Commissioners on Grievances and Discipline on the report of the Hearing Panel, the transcript of the proceedings before the Panel and the exhibits. Upon consideration thereof the Board makes the following Findings of Fact and Recommendation.

FINDINGS OF FACT.

The Respondent is 62 years of age, married, and was admitted to the practice of law in the State of Ohio in January, 1936. He has practiced law continuously since that time. In 1951 he was president of the Cuyahoga County Bar Association.

On October 25, 1961, Respondent, together with another attorney, Frank J. Wagner, came to Alex Nagy's place of business at 4382 West 130th Street, Cleveland, Ohio. Wagner introduced Nagy to Respondent and ex-

plained to him in Hungarian that Respondent had made money for investors and would be able to make money for Mr. Nagy by purchasing real estate in the name of a syndicate.

On the following day Respondent took Mr. Nagy to Rocky River, Ohio, on Wooster Road, south of Hilliard and showed him two apartment buildings. Respondent told Mr. Nagy he was in a position to buy these properties in the name of a corporation which he would organize so that any investment made by Nagy would be in the stock of the corporation.

On November 6, 1961, Respondent came to Mr. Nagy's place of business and Mr. Nagy delivered to Respondent two checks drawn on the Cleveland Trust Company payable to Alex Nagy. Each check was for the sum of Two Thousand Dollars ($2,000). Both checks were endorsed in blank by Mr. Nagy. Below Mr. Nagy's endorsement on one of the checks for Two Thousand Dollars ($2,000) dated November 3, 1961, there is a notation that the check was in payment for twenty percent of the stock in Nagy Eleven-Six, Inc. On the other check for Two Thousand Dollars ($2,000) dated November 6, 1961, there is below Nagy's endorsement the notation that the check was in payment for twenty percent of stock in Nagy Eleven-Three, Inc. Respondent also endorsed both checks personally. At the time of the delivery of said checks to Respondent, the Respondent gave to Mr. Nagy a receipt signed by Respondent personally acknowledging the receipt of the Four Thousand Dollars ($4,000) as payment in full for twenty percent of the stock authorized and issued in Nagy Eleven-Three, Inc., and Nagy Eleven-Six, Inc. Respondent further represented that he and his associates were to receive twenty percent of the stock issued by each corporation for legal services to be performed.

No stock was ever issued or delivered to Mr. Nagy in any corporation.

Neither at the time of the payment of the Four Thousand Dollars ($4,000) by Mr. Nagy nor at any subsequent time, were Articles of Incorporation filed in the Office of the Secretary of State of Ohio for either Nagy Eleven-Three, Inc., or Nagy Eleven-Six, Inc.

Following his receipt of the two checks totaling Four Thousand Dollars ($4,000) from Mr. Nagy, Respondent on November 7, 1961, deposited said checks in an account in the National City Bank of Cleveland entitled "H. Franklin Hamilton, special account."

Also on November 7, 1961, Respondent opened two separate accounts in the National City Bank of Cleveland. One was in the name of Nagy Eleven-Six Company, a partnership, and the other in the name of Nagy Eleven-Three Company, a partnership. The sum of One Thousand Dollars ($1,000) was deposited in each account. Withdrawal from each account required the signatures of both Respondent and Frank J. Wagner.

The One Thousand Dollars ($1,000) in each of these two partnership accounts was subsequently withdrawn as follows:

(1) A check dated November 30, 1961, was drawn on the Nagy Eleven-Six Company account in the sum of One Thousand Dollars ($1,000) payable to the Hilliard Rocky River, Inc. Said check was signed "The Nagy Eleven Six, Inc., by Frank J. Wagner and H. Franklin Hamilton" (Respondent). This sum was paid as consideration for a six month real estate option dated December 14, 1961, granted to Nagy Eleven-Six, Inc., to purchase the premises at 2788-2848 Wooster Road in Rocky River, Ohio, for the sum of Two Hundred Two Thousand Dollars ($202,000). Said option was signed by Respondent and

Frank J. Wagner as President and Secretary respectively of Nagy Eleven-Six, Inc.

(2) A check dated January 8, 1962, for One Thousand Dollars ($1,000) was drawn on the Nagy Eleven-Three Company account payable to Morton H. Frank, William J. Bailis and Joseph A. Laronge, Inc. Said check was signed by the Nagy Eleven-Three Company by Respondent and Frank J. Wagner. This sum was paid as consideration for a six month land option dated January 10, 1962, granted by the owners to Nagy Eleven-Three, Inc., to purchase the apartments at 2626-2702 Wooster Road, Rocky River, Ohio, for Two Hundred Fifty-Five Thousand Dollars ($255,000). Said land option was a unilateral contract and neither Respondent's signature nor any other optionee appeared thereon.

Several months after Nagy's payment of the Four Thousand Dollars ($4,000) to Respondent, Mr. Nagy inquired of Respondent as to the issuance of stock and the purchase of properties. After a number of conversations between Mr. Nagy and Respondent extending over some period of time, Respondent finally admitted to Mr. Nagy that the properties could not be purchased and the transaction consummated as intended.

Mr. Nagy told Respondent he could not afford the loss and demanded the return of his money. Respondent's associate, Frank J. Wagner, who had introduced Respondent to Nagy, insisted that Nagy be reimbursed for any loss. Although Respondent claims that he executed and delivered to Mr. Nagy his personal promissory note for Four Thousand Dollars ($4,000) to cover the loss, Mr. Nagy denies knowledge of receiving any note and there is no evidence other than Respondent's own testimony that a note was ever delivered to Mr. Nagy.

On August 6, 1962, Articles of Incorporation for

Wooster House, Inc., were filed in the Office of the Secretary of State for the purpose of purchasing or otherwise acquiring real property. Respondent along with Frank J. Wagner and A. L. Kearns are listed as incorporators. Respondent claims that he had determined to place his properties to be acquired under option into one corporation instead of the two corporations as originally intended at the time of his business dealings with Mr. Nagy and that accordingly, he organized Wooster House, Inc. No stock was ever issued to Mr. Nagy in Wooster House, Inc., and there is no evidence that the incorporators did anything following the filing of the Articles.

Respondent claims the entire amount of Four Thousand Dollars ($4,000) received from Mr. Nagy was used to acquire the options to purchase real estate, to pay advertising expenses, salaries, carpeting, a model suite for exhibition, and similar promotional expense. Except for the sum of Two Thousand Dollars ($2,000) expended to acquire the options, Respondent failed to produce any proof substantiating such expenses. Respondent claims that any and all receipts for such expenses were inadvertently destroyed or thrown away.

CONCLUSION.

Respondent was acting as an attorney for a client in this transaction since he was to participate in and receive 20% of the stock issued by each corporation for legal services.

By his complete failure to account for the funds paid to him by a client and by his conduct and admissions, supported by the evidence, Respondent was guilty of commingling and using said funds in violation of Canon 11 of the Canons of Professional Ethics and thereby committing a felony involving moral turpitude in violation of

Section 2907.34 of the Revised Code of Ohio and Section (5)(A) of Rule XVIII of the Supreme Court.

RECOMMENDATION.

On the basis of the foregoing Findings and Conclusion, it is the recommendation of the Board that the Respondent, H. Franklin Hamilton, be permanently disbarred from the practice of law pursuant to Section 6(a) of Rule XVIII of the Supreme Court of Ohio.

Chairman, Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio

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Secretary, Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio

APPENDIX D.

Opinion of the Supreme Court of Ohio.

Cleveland Bar Assn. v. Hamilton, 6 Ohio St. 2d 264

Attorneys at law—Misconduct—Disciplinary action—Suspension from practice for indefinite period—Acts warranting—Misappropriation and misapplication of client's funds.

(D. D. No. 73—Decided June 15, 1966.)

ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline.

Relator, the Cleveland Bar Association, filed a complaint against H. Franklin Hamilton, respondent, an attorney at law duly admitted to practice in Ohio, charging him with misconduct in that he misappropriated and misapplied substantial funds entrusted to him by a client for a specific purpose.

The charges against respondent were presented upon evidence and exhibits to a hearing panel consisting of three members of the Board of Commissioners on Grievances and Discipline upon the panel's report and upon a consideration of the evidence and exhibits, the board found that in November 1961 respondent obtained the total sum of $4,000, represented by two checks of $2,000 each from one Alex Nagy, for which Nagy was to receive 20% of the stock of two Ohio corporations to be formed for the purpose of buying real estate. These corporations never materialized, and no stock was ever issued or delivered to Nagy. Several months after the payment of the $4,000 by Nagy to respondent, Nagy contacted respondent on a number of occasions and was finally advised by him that the real estate could not be purchased and the plan consummated. Nagy then demanded the return of his $4,000. Respondent claims that he executed and delivered to

Nagy his personal promissory note for $4,000, but Nagy denied this, and there is no evidence to support respondent's contention other than his own testimony.

In August 1962, articles of incorporation were filed in the office of the Secretary of State for a corporation designated as Wooster House, Inc., organized for the purpose of buying or otherwise acquiring real property. No stock in this corporation was ever issued to Nagy, and it does not appear that the incorporators moved in any way after filing the articles.

It is respondent's claim that Nagy's $4,000 was expended in acquiring options to purchase real estate and in paying certain expenses, including promotional expenses. Except for the sum of $2,000 spent in acquiring options, no proof was introduced to substantiate such expenses, and respondent testified that receipts for such expenses had disappeared. Incidentally during the hearing before the panel Nagy was paid $4,000, and he signed a release.

The board's conclusion is that respondent was acting as an attorney for a client in the transactions involved, since he was to receive 20% of the stock issued by the proposed corporations for legal services, and that by his failure to account for the funds paid him by a client and by his conduct and admissions, as shown by the evidence, he was chargeable with commingling and using such funds in violation of Canon 11 of the Canons of Professional Ethics, and he thereby committed an offense involving moral turpitude in violation of Section 2907.34, Revised Code of Ohio, and was guilty of misconduct as defined in Section (5) (a) of Rule XVIII of the Supreme Court of Ohio.

Upon the findings and conclusion outlined, the board recommended that respondent be permanently disbarred

from the practice of law pursuant to Section (6) (a) of Rule XVIII of the Supreme Court of Ohio.

The matter is now before this court for determination upon the report of the board and respondent's objections thereto.

Mr. E. M. Rose and *Mr. Robert N. Gudbranson,* for relator:

Mr. A. L. Kearns, for respondent.

Per Curiam. From an examination of the transcript of the evidence and the exhibits, we are of the view that the findings of the board are supportable; that respondent in the capacity of an attorney misappropriated and misapplied funds entrusted to him by a client; and that his conduct was reprehensible and indefensible and constituted a violation of the Canons of Professional Ethics and the rules of this Court, as specified by the board. However, because of certain mitigating circumstances, this Court is of the opinion that the recommendation of the board should be reduced from disbarment to a suspension for an indefinite period under Section (6) (b), Rule XVIII of this court.

Report confirmed as herein modified and judgment accordingly.

TAFT, C. J., ZIMMERMAN, MATTHIAS, O'NEILL, HERBERT SCHNEIDER and BROWN, JJ., concur.

APPENDIX E.

Statute.

Section 2907.34, Ohio Revised Code:

No officer, attorney at law, agent, clerk, guardian, executor, executrix, administrator, administratrix, trustee, assignee in insolvency, receiver, officer of a lodge or subordinate body of a fraternal or mutual benefit society, servant, or employee of a person, except apprentices or persons under eighteen years of age, shall embezzle or convert to his own use, fradulently take or make away with, or secrete with intent to embezzle or convert to his own use anything of value which comes into his possession by virtue of his election, appointment, or employment thereto.